

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

Western Wireless Corporation)
Petition for Preemption Of)
An Order Of The South Dakota)
Public Utilities Commission)

WESTERN WIRELESS CORPORATION
OPPOSITION TO PETITIONS FOR RECONSIDERATION

WESTERN WIRELESS CORPORATION

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EXECUTIVE SUMMARY

The Commission should deny the reconsideration petitions. The Commission correctly concluded that Section 214(e)(1) of the Act does *not* require that an applicant for designation as an eligible telecommunications carrier (“ETC”) already be providing ubiquitous universal service prior to having the application granted. Furthermore, the Commission’s decision to resolve the question by issuing a declaratory ruling was procedurally sound, and consistent with FCC precedent under Section 253 of the Act.

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**WESTERN WIRELESS CORPORATION
OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Western Wireless Corporation ("Western Wireless") submits that the Commission should deny the petitions for reconsideration of the *Declaratory Ruling*. 1/ The Commission properly answered in the negative the legal question of whether an applicant for designation as an eligible telecommunications carrier ("ETC") must already be providing ubiquitous universal service to receive favorable action on its application. Furthermore, the Commission proceeded properly by resolving the question through a declaratory ruling, and did not depart its precedent under Section 253 of the Communications Act of 1934, as amended

1/ *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petitions for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, FCC 00-248 (rel. Aug. 10, 2000) ("*Declaratory Ruling*"). This Opposition to the Petitions for Reconsideration filed on September 11, 2000 by Project Telephone Company and Range Telephone Cooperative ("Project/Range"), and by the South Dakota Independent Telephone Coalition ("SDITC") (together, the "Petitioners") is submitted pursuant to 47 C.F.R. § 1.1106(g).

(“Act”). 2/ In sum, there is no basis for reversing or otherwise disturbing the *Declaratory Ruling* at issue here. 3/

The Petitioners, by challenging the *Declaratory Ruling*, continue their futile struggle against the erosion of their monopoly status initiated by adoption of the Telecommunications Act of 1996 (“1996 Act”). This struggle flies in the face of Congress’s clear intent that competitive entrants that meet the statutory criteria must be eligible to receive the same universal service support as incumbents. Against the weight of every state commission other than South Dakota that has decided the issue – as well as a South Dakota court and now the FCC – Petitioners argue that “the construction of section 214(e) in the *Declaratory Ruling* is simply wrong.” 4/ However, as shown below, the only things “simply wrong” here are the intransigent efforts of monopolists trying to stave off competitive entry into their markets any way they can, and their arguments that the FCC somehow erred in adopting the *Declaratory Ruling*. 5/

2/ 47 U.S.C. § 253.

3/ The text of this Opposition addresses the Petitioners’ main substantive and procedural challenges to the *Declaratory Ruling*. We address Petitioners’ ancillary arguments in the attached Appendix A.

4/ SDITC at 7; *accord*, Project/Range at 12-14.

5/ The text of this filing addresses the Petitioners’ main substantive and procedural challenges to the *Declaratory Ruling*. We address Petitioners’ ancillary arguments in the attached Appendix A.

I. THE FCC PROPERLY INTERPRETED SECTION 214(e)(1)

The Commission should sustain its decision in the *Declaratory Ruling* by rejecting the arguments here that the “plain meaning” of Section 214(e)(1) requires applicants for ETC status to already be providing ubiquitous universal service in order to receive designation under Sections 214(e)(2) and 214(e)(6) of the Act. 6/ The legal discussion in our Reply Comments filed in this proceeding, 7/ and the well-reasoned analysis of not only this Commission, 8/ but of the state commissions other than the South Dakota Public Utilities Commission (“SDPUC”) that have addressed the issue, 9/ combine to make the conclusion reached in the *Declaratory Ruling* unassailable. 10/

6/ Project/Range at 12-14; SDITC at 6-9.

7/ See Reply Comments of Western Wireless at 4-13, filed September 17, 1999, in *Western Wireless Corporation Petitions for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, DA 99-1356 (rel. July 19, 1999).

8/ *Declaratory Ruling*, ¶¶ 27-31.

9/ E.g., *Minnesota Cellular Corp. Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285, 1999 WL 1455080, at 16 (MN PUC Oct. 27, 1999); *Western Wireless Corporation Designated Eligible Carrier Application*, Case No. PU-1564-98-428 (ND PSC Dec. 15, 1999); *Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier*, Docket No. 98-2216-01 (Utah PSC July 21, 2000); see also *Filing by GCC License Corp. for Designation as an ETC*, Civ. 99-235 (6th Jud. Cir. March 22, 2000) (reversing SDPUC order denying Western Wireless ETC status on grounds that ETC applicants must be already providing universal service before being designated).

10/ There is no merit to the suggestion that the *Declaratory Ruling* “entirely fails to discuss the contentions on the record that the statute itself establishes a present requirement to offer the supported services.” Project/Range at 13. In reality, the *whole* of the Commission’s ruling serves to consider and reject those contentions as the meritless and anti-competitive arguments they are.

No other interpretation is reasonable in the pro-competitive environment Congress envisioned when it adopted the 1996 Act. The FCC's decision that, as a matter of law and statutory interpretation, Section 214(e) cannot be read as requiring ETC applicants to be already providing universal service prior to designation, and that the imposition of such a requirement would run afoul of the prohibition in Section 253(a) of the Act, 11/ is the only one with a reasonable basis within the overall context of the 1996 Act. Congress simply could not have intended to place on new entrants the burden of entering high-cost areas to compete with subsidized incumbents without even knowing that identical subsidies would be provided for serving the same customers. There can be no doubt that improperly denying ETC designation to an otherwise qualified carrier inhibits competitive entry in a manner at odds with Congress' intent underlying the universal service provisions of the Act.

Hence, contrary to Petitioners' assertions, the Commission did not "assume the factual conclusion that the SDPUC's ruling . . . has the effect of prohibiting competitive entry." 12/ There is ample support for the FCC's conclusion that requiring carriers to provide supported services before being designated as an ETC has the effect of prohibiting prospective entrants from providing telecommunications services in high-cost areas. That determination, in fact, is what lies at the

11/ 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

heart of the 1996 Act's command that the Commission and the states reform universal service in a manner that makes all subsidies specific and explicit. 13/ In the final analysis, there is no way that Section 214(e)(1) can be reasonably interpreted as requiring new entrants seeking ETC designation to be already providing universal service. 14/ The petitions for reconsideration arguing for such an approach must be denied.

[Footnote continued]

12/ Project/Range at 3 (internal quotation omitted).

13/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 11 FCC Rcd 8776, 8799-8805, ¶¶ 44-50, 55 (1997) (citing 47 U.S.C. § 254(b)); *see also Alenco Comms. v. FCC*, 201 F.3d 608, 615-16 (5th Cir. 2000), in which the court held that, under the 1996 Act:

The FCC must see to it that both universal service and competition are realized; one cannot be sacrificed for the other[and must make] the changes necessary to its universal service program[.] * * * * [T]he old regime of implicit subsidies . . . must be phased out and replaced with explicit universal service subsidies . . . because a competitive market can bear only the latter. * * * * [T]he program must treat all market participants equally . . . so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers.

14/ Even if Section 214(e)(1) were deemed facially ambiguous as to the timing of offering the supported services and receiving ETC designation, the interpretation in the *Declaratory Ruling* is an eminently reasonable and pro-competitive choice among the available options, and would be entitled to significant deference by a reviewing court. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The discussion in the text demonstrates that the context and overall legislative intent of the Act provide a reasonable basis for the statutory construction of Section 214(e)(1) adopted in the *Declaratory Ruling*.

II. THE COMMISSION'S ISSUANCE OF THE *DECLARATORY RULING* IS PROCEDURALLY SOUND

The Commission should reject Petitioners' misplaced arguments that the agency acted improperly in electing to decide the issues in the instant proceeding through a declaratory ruling. First, as shown below, the Commission has broad discretion to adopt declaratory rulings. ^{15/} Second, because the Commission opted to exercise this discretion rather than actually preempt any action by the SDPUC, there can be no argument that the agency deviated from its Section 253 precedents.

It is important to be clear what the Commission did in the *Declaratory Ruling*: it clarified a legal issue regarding the interpretation of Section 214(e)(1) of the federal Act. The Commission's action was not dependent upon any action by the SDPUC, nor did it require interpretation of the facts surrounding the provision of service by Western Wireless or any other carrier in South Dakota. Rather, the FCC determined that, given the controversy over how to apply Section 214(e)(1), the fact that improper applications of that provision could thwart Congress' intent to open all markets to competitive entry, and the importance of ETC designation to

^{15/} See, e.g., *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (holding that "the Commission's decision to issue a declaratory ruling to preempt state and local regulation . . . following notice and an opportunity to comment, did not amount to an abuse of discretion," in part because "[t]he decision whether to proceed by rulemaking or adjudication lies within the Commission's discretion" "regardless of whether the decision may affect agency policy and have general prospective application.") (citing 5 U.S.C. § 554(e); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1974); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976); *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 62 n.9 (2nd Cir. 1982); *North Carolina Utils.*

[Footnote continued]

competitive entry in high-cost areas, guidance from the FCC was necessary and appropriate. The Commission long ago resolved that:

we are not obliged to, nor do we deem it appropriate to, await some definitive action by a State or a carrier which creates a conflict between Federal and State regulation having the ingredients of a conventional case or controversy before issuing [] a declaratory ruling. 16/

In view of this long-standing approach to declaratory rulings and the purely legal question at issue in this proceeding, the Commission has not “ignored” its alleged “policy and precedent” of treating declaratory rulings as inappropriate means of resolving cases involving disputes of material facts, 17/ nor has it deviated from precedent of not adopting declaratory rulings where facts are in dispute. 18/

The Commission should thus dismiss arguments that the *Declaratory Ruling* is flawed because the factual record is lacking or that Commission action

[Footnote continued]

Comm’n v. FCC 537 U.S. F.2d 787, 791 (4th Cir. 1976)) (internal quotations and citations omitted).

16/ *Silver Star Telephone Co.*, CCB Pol. 97-1, Memorandum Opinion and Order, 13 FCC Rcd 16356, 16367-68, ¶ 23 n.50 (1998) (quoting *Telerent Leasing Corp.*, 45 FCC.2d 204 (1974), *aff’d sub nom.*, *North Carolina Utils. Comm’n v. FCC*, *supra* note 15) (internal quotations omitted).

17/ See Project/Range at 3-4 (citing *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 14221, 14317 (1999)).

18/ *Id.* at 6 (quoting *Action for Children’s Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987)).

was unnecessary. 19/ In the first instance, no factual record of any kind is needed for a declaratory ruling where, as here, no findings of fact are required. Indeed, in a similar circumstance where a party argued that a request for declaratory ruling “should be dismissed because it has not presented facts or circumstances with sufficient specificity,” it was held that:

The question presented concerns a point of law[.] This does not require an elaborate factual record. The petition and the comments present an adequate basis . . . to issue a ruling addressing this question. Similarly, [the] contention that the issue should be referred [] for further study lacks merit because, as several parties have noted, the issue is a question of law, not fact. Thus, we reject [the] procedural objections to the requested declaratory ruling. 20/

Moreover, the predicate for the *Declaratory Ruling* is clear. The FCC has developed an ample record in this docket that decision-makers in the ETC designation process are reaching (or are being asked to reach) decisions at odds with the clear meaning of Section 214(e)(1). The SDPUC had already reached a decision in conflict with the plain meaning of Section 214(e)(1). And, in ETC designation proceedings under Section 214(e)(6), the FCC was informed of an initial decision of an Oklahoma administrative law judge (“ALJ”) recommending denial of an ETC

19/ Project/Range at 4-5; SDITC at 2, 4-5.

20/ See *Local Exchange Carrier Blocking of Feature B Group Traffic Transiting Access Tandems*, Memorandum Opinion and Order, 61 R.R.2d (P & F) 437, 440 (CCB 1986).

application in reliance on the SDPUC's reasoning, and the Commission itself had been asked in two proceedings to do the same. 21/

Likewise, the Commission did not depart from its Section 253 jurisprudence because, quite simply, it did not issue a preemption order. 22/ Rather, the Commission issued a declaratory ruling to resolve two questions of law: (1) may Section 214(e)(1) be read as requiring new entrant ETC applicants to be already providing universal service before being designated, and (2) if not, would a contrary interpretation be subject to preemption under Section 253 and/or traditional preemption principles? The *Declaratory Ruling* correctly answered the first of these questions in the negative, and the second in the affirmative. As noted above, the *Declaratory Ruling* did not decide Western Wireless' petition to preempt the SDPUC's ruling denying the company ETC status in South Dakota, 23/ nor did the

21/ See *Public Notice, Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier to Provide Services Eligible for Universal Service Support in Wyoming*, CC Docket No. 96-45, DA 99-2511 (rel. Nov. 10, 1999), Comments of U S WEST at 3-8 and Exhibit C (submitting transcript of ruling of ALJ in *Application of GCC License Corporation for Certification as an Eligible Telecommunications Carrier*, Cause POD No. 980000470, Oral Ruling of ALJ (Okla. Corp. Comm'n May 13, 1999) (recommending denial of ETC status to Western Wireless for failure to provide universal service before designation)); Comments of the Wyoming Telecommunications Association at 5-6, both filed December 17, 1999; *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Services Eligible for Universal Service Support to Crow Reservation, Montana*, CC Docket No. 96-45, Public Notice, DA 99-1847 (rel. Sept. 10, 1999), Initial Comments of U S WEST at 9-11, Comments of Project/Range at 24-27, Montana Telecommunications Association and Montana Independent Telecommunications Systems at 1-2, all filed October 12, 1999.

22/ *Contra*, SDITC at 9-12.

23/ *Declaratory Ruling*, ¶ 3.

Commission take any action that, standing on its own, forces the hand of any state commission, judge or other decision-maker. As such, the *Declaratory Ruling* cannot be a deviation from the Commission's precedents under Section 253.

In sum, the Commission's adoption of the *Declaratory Ruling* is consistent with sound principles of agency discretion, the provisions of the Act, and the Commission's policies and precedents. 24/ The Commission should therefore reject Petitioners' procedural challenges to the *Declaratory Ruling*.

III. THE COMMISSION SHOULD DENY SDITC'S SUPERFLUOUS AND BASELESS REQUEST FOR CLARIFICATION

The Commission should reject as wholly unnecessary SDITC's request for an alleged "clarification" that state commissions can require supported services to be offered immediately after ETC designation, or within a specified time thereafter. 25/ A carrier designated as an ETC cannot seek universal service support until the carrier serves a qualifying customer. If the carrier never provides universal service to such a customer, the ETC designation is virtually meaningless, as the carrier derives no benefit therefrom, *i.e.*, it receives no support. Thus, the requirement that the carrier provide universal service is self-regulating. Once universal service to supported customers commences, a carrier that dips below the minimum requirements of being an ETC risks losing its designation and its support, not to

24/ As noted *supra*, Western Wireless' response to some of Petitioners' more minor points is contained in Appendix A. See note 5.

25/ SDITC at 8-9.

mention its customers, who will take service from ETCs providing all the supported services instead. Thus, there is no risk of “speculation in the universal service fund mechanism” or of the ETC designation “becoming an open-ended promise,” because until a carrier designated as an ETC actually provides and sustains service, it can gain nothing from the fund, promised or otherwise. 26/

26/ In addition, the Commission should reject SDITC’s argument that, because the Commission did not preempt a Texas requirement that CLECs provide service within thirty days of receiving a request, the Commission should impose here a similar deadline for ETCs to provide supported services. SDITC at 8-9 (citing *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3507-08 (1997)). The fact that a particular state rule was not subject to preemption under Section 253 does not provide a basis for concluding that the same rule should be applied nationwide in a different context.

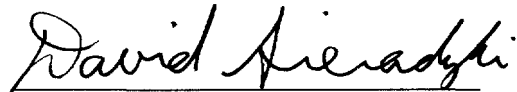
IV. CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration of the South Dakota *Declaratory Ruling* filed by Project/Range and SDITC in the instant proceeding.

Respectfully submitted,

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APPENDIX A
Western Wireless Response to Petitioners' Ancillary Arguments

SDITC and Project/Range offer in support of their substantive and procedural challenges to the *Declaratory Ruling* numerous specious arguments that can be summarily addressed and rejected. Those arguments are listed and rebutted below:

- **Argument:** Even if “gaps” in coverage do not preclude ETC designation, the differential in gaps between the incumbent and the prospective ETC must be compared. Project/Range at 13-14 (citing *Declaratory Ruling*, ¶ 17).

Project/Range’s elaboration on the “gap” argument, *i.e.*, that gaps in wireless coverage are somehow more significant than those in wireline service (which they argue are easier to fill), is wrong as a blanket assertion of fact, and irrelevant as a matter of law. The Commission has already recognized that the extension of wireline service to unserved “gaps” can often be a substantial undertaking. *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, ¶¶ 59 n.155, 60, 62 & n.174 (rel. June 30, 2000) (“*Twelfth R&O*”). Moreover, there is no principled basis for distinguishing between wireline versus wireless carriers based on the costs of extending service. Once designated, both wireline and wireless ETCs are obligated – and they expect – to extend services expediently upon request. So long as both commit to doing so, and demonstrate the ability to fulfill that commitment, both should be designated as ETCs.

- **Argument:** Examination of Western Wireless' costs is required before the Commission may conclude that requiring prospective ETCs to be already providing universal service is a barrier to entry. Project/Range at 6-11.

Regardless of a particular prospective entrant's cost structure, it is clear that impermissibly subsidizing one carrier and not another is a barrier to entry, usually because it allows the subsidized carrier to undercut the unsubsidized carrier for substitutable services. The notion that an unsubsidized carrier could provide a substitutable service at less than even the artificially deflated price charged by the subsidized carrier is somewhat far-fetched, but even in such a case there is still a disincentive to entry for the new entrant. The subsidy allows significant inefficiency by the incumbent, while requiring the new entrant to maintain the efficiency that allows it to offer substantially lower prices. Subsidizing one carrier but not another also flies in the face of the principles of open competition and competitive neutrality that are central to universal service policy under the 1996 Act.

- **Argument:** Denying ETC status to Western Wireless for failure to already be providing universal service is less of a barrier to entry because it results in a denial of funding for only the 30% of access lines in South Dakota for which support is available. Project/Range at 11.

Not only does this argument misguidedly presuppose that being shut out of serving customers in high-cost areas in one-third of a state is somehow inconsequential, it flies in the face of Section 253(a), which holds that the prohibition or inhibition to the provision of "*any . . . telecommunications service*" is subject to preemption by the FCC. *See* 47 U.S.C. § 253(a), (d). It also ignores the possibility that additional support may become available in the future, such as through the new mechanism created by the CALLS Plan. *See Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193 (rel. May 31, 2000).

- **Argument:** Because federal Article III courts refuse to issue declaratory rulings, both as a general matter and particularly where the issues are likely to

be adjudicated in a different forum, the Commission should have declined to adopt the *Declaratory Ruling*. SDITC at ____.

The case-and-controversy strictures that apply to federal courts do not apply to the FCC, so the agency is free to issue advisory rulings such as the *Declaratory Ruling*. See, e.g., *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) (rejecting arguments that the Commission erred in issuing a declaratory ruling after an FCC preemption petition became moot, because, “this argument confuses the jurisdictional requirements of the FCC with those of an Article III court [because the FCC] is not bound by the constitutional requirement of a ‘case or controversy’ that limits the authority of article III courts to rule on moot issues.”) (citing *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995)). This is particularly true where, as here, issuing a declaratory ruling allows the FCC to avoid issuing an order preempting a specific state commission action.

- **Argument:** The *Declaratory Ruling* was unnecessary in view of the state court reversal of the SDPUC’s order denying ETC status to Western Wireless.

First, the *Declaratory Ruling* prevents other states from making the same mistake as the SDPUC. Moreover, even if every state commission other than the SDPUC proceeds to interpret Section 214(e)(1) properly (or is corrected on appeal), and every recommendation for improper construction by an ALJ is rejected by the state commissions, issuance of the *Declaratory Ruling* is still prudent and procedurally sound. In virtually every ETC designation proceeding involving a new entrant, there are intervenors like Project, Range, and the members of the SDITC who insist that Section 214(e)(1) be interpreted in a manner that unreasonably discriminates in favor of the incumbent monopoly carriers. The *Declaratory Ruling* now allows state commissions to reject those arguments expeditiously and with certainty that they are applying

Section 214(e)(1) properly. *Cf.*, *Twelfth R&O*, ¶ 94 (stating concern that “excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas”).

- **Argument:** The Commission should have deferred to the SDPUC’s power to interpret Section 214(e)(1), and/or should have forestalled action in this matter in deference to state appellate proceedings, and by its failure to do so the FCC “abused its administrative discretion.” SDITC at 5.

The Commission and the federal courts are the ultimate arbiters of how to implement the 1996 Act, so it was entirely proper for the Commission to resolve the issue of how to interpret a provision of the *federal* Communications Act. *See Southwestern Bell Tel. Co. v. Connect Comms.*, ___ F.3d ___, 2000 WL 1279976, *4-5 (8th Cir. Sept. 12, 2000) (holding that the federal government “unquestionably” has “taken the regulation of local telecommunications competition away from” the states, and that “the new regime for regulating competition in this industry is federal in nature” with “the scope of that role [] measured by federal, not state law”) (quoting and citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 379 n.6 (1999)).

- **Argument:** A general public interest finding must be made under Section 214(e)(2) and (6) for all areas, in addition to the public interest finding that must be made for areas served by rural telephone companies. Project/Range at 11 n.21.

The statutory public interest inquiry in Section 214(e)(2) is required only for areas served by rural telephone companies, and not non-rural-telephone-company service areas, where state commissions are directed to designate as ETCs carriers meeting the requirements of Section 214(e)(1). *See, e.g.*, *Minnesota Cellular Corp. Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285, ¶ 36 (MN PUC Oct. 27, 1999) (“a primary purpose to be served by [] state decision-making, *particularly in the case of non-rural areas since there is no public interest test and the*

states must designate an ETC, is to determine whether the company seeking designation as an ETC is capable of offering the services”) (emphasis added). Not only does Project/Range’s reading conflict with the plain language of the statute, their interpretation would render the public interest requirement for rural service areas superfluous, contrary to long-accepted maxims of statutory interpretation. *See, e.g., C.F. Comms. Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (reversing FCC action based on Act interpretation that “violates the familiar principle of statutory interpretation which requires construction ‘so that no provision is rendered inoperative or superfluous, void or insignificant’”) (quoting *Mail Order Ass’n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993)).

- **Argument:** The Commission has decided Western Wireless’ preemption petition by issuing the *Declaratory Ruling*.

If the South Dakota Supreme Court affirms the decision below, everyone will be in agreement – the FCC, the intermediate South Dakota court of appeal, and the state Supreme Court – and the FCC can dismiss Western Wireless’ petition as moot. If the South Dakota court takes the unlikely step of reversing the lower court’s ruling, the Commission could revive Western Wireless’ petition and decide it in the context of only the South Dakota case at that time. If and when it becomes necessary and appropriate for the FCC to “revive” Western Wireless’ preemption petition, Western Wireless is confident that there is ample evidence in the record to support a Commission finding that requiring an ETC applicant to already be providing ubiquitous universal service *prior to* being designated is a barrier to entry.

- **Argument:** The *Declaratory Ruling* is inconsistent with the Commission’s Section 253 precedents calling for “credible and probative evidence that the challenged requirement falls within the proscription of Section 253(a),” SDITC at 10-12 (citing *TCI Oakland County*), and that the prohibition on entry is “material.” Project/Range at 11-12 (citing *California Payphone Ass’n*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206, ¶ 31 (1997); *Petition of State of Minnesota for a Declaratory Ruling Regarding the Effect of*

Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, 14 FCC Rcd 21697, 21710 (1999)).

Even if comparison to previous Commission decisions under Section 253 were warranted (which this opposition demonstrates is not the case), the *Declaratory Ruling* is consistent with those precedents. As discussed in the text, the FCC can discern from the Act itself, the FCC's own policies adopted in conjunction with the Joint Board, and basic economic principles that credible and probative evidence exists that requiring ETC applicants to already be providing ubiquitous universal service has the effect of materially prohibiting the provision of new-entrant telecommunications services in high-cost areas.

- **Argument:** The “savings clause” in Section 253(f) permits the SDPUC to deny Western Wireless ETC status on grounds that the company allegedly is not already offering ubiquitous universal service in South Dakota. SDITC at 11-12.

Section 253(f), by its terms, has no application to commercial mobile radio service (“CMRS”) providers such as Western Wireless. *See* 47 U.S.C.

§ 253(f)(2); *see also* 47 U.S.C. § 332(c)(3) (preempting state regulation of CMRS rates and entry). Moreover, SDITC misinterprets Section 253(f); that provision does not entitle state commissions to improperly deny ETC status to new entrants in rural telephone company service areas. Rather, it merely permits state commissions to require non-CMRS new entrants to meet the requirements of Section 214(e)(1) before being permitted to provide service in such areas. Therefore, Section 253(f) is irrelevant to the issue addressed in the *Declaratory Ruling*.

CERTIFICATE OF SERVICE

I, Venita Otey, hereby certify that on this 21st of September, 2000, copies of the foregoing Opposition, were served on the parties listed below by hand and/or via facsimile.


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